UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
E. I. du Pont de Nemours	)	**DOCKET NOS. TSCA-HQ-2004-0016**
and Company,	)	**RCRA-HQ-2004-0016**
	)	**TSCA-HQ-2005-5001**
RESPONDENT	)	

ORDER DENYING MOTIONS FOR ACCELERATED DECISION ON COUNTS II AND III
ORDER SETTING PREHEARING EXCHANGE SCHEDULE FOR COUNTS II, III, AND IV

Procedural Background

The complainant in this matter is the Office of Civil Enforcement[1] ("OCE" or "Complainant") of the United States Environmental Protection Agency ("the EPA"). OCE contends that Respondent, E.I. du Pont de Nemours and Company ("DuPont" or "Respondent"), committed violations of the Toxic Substances Control Act ("TSCA") and Resource Conservation and Recovery Act ("RCRA"). On July 8, 2004, OCE filed its first complaint in this matter, the Complaint and Notice of Opportunity for Hearing ("Complaint"), under docket numbers TSCA-HQ-2004-0016 and RCRA-HQ-2004-0016, to which DuPont filed its Answer and Request for Hearing ("Answer").

OCE alleges, in Counts I and II, that DuPont violated Section 8(e) of TSCA, which provides that:

> Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the [EPA]

[1] The Office of Civil Enforcement is the new name for the Office of Regulatory Enforcement. Notice of Office Name Change (Feb. 17, 2005).

> Administrator of such information unless such person has actual knowledge that the [EPA] Administrator has been adequately informed of such information.

15 U.S.C. § 2607(e). Specifically, OCE alleges in Count I failure to provide blood sampling information regarding transplacental movement of perflurooctanoic acid ("PFOA") in humans, and alleges in Count II failure to report PFOA contamination of the public water supply. In Count III, brought pursuant to Section 3008 the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928, OCE alleges that DuPont violated its RCRA permit by failing to provide blood sampling information concerning the transplacental movement of PFOA (also referred to as "C-8" or ammonium perfluorooctanoate ("APFO")) in humans.

On September 8, 2004, DuPont filed a Motion for Accelerated Decision on Counts II and III ("DuPont's Motion for Acc. Dec.") and requested oral argument on that motion. Shortly after DuPont moved for accelerated decision, OCE moved to amend its Complaint, to replace it with the First Amended Complaint and Notice of Opportunity for Hearing ("Amended Complaint"), and I granted that motion. DuPont filed its Answer to First Amended Complaint and Request for Hearing ("Amended Answer"). On October 8, 2004, OCE filed a response to DuPont's Motion for Accelerated Decision, and OCE also moved for accelerated decision, only as to Count III. *See* Complainant's Mem. of Law in Support of Its Response to Respondent's Motion for Accelerated Decision on Count II ("OCE's Count II Response"); Complainant's Mem. of Law in Support of: Response to Respondent's Motion for Accelerated Decision, and Motion for Accelerated Decision on Liability for Count III ("OCE's Count III Response"). DuPont filed reply briefs as to both Counts II and III. *See* DuPont's Reply Brief in Support of Its Motion for Accelerated Decision on Count II (Oct. 19, 2004) ("DuPont's Count II Reply"); DuPont's Reply Mem. in Support of Its Motion for Accelerated Decision on Count III and Mem. in Opposition to EPA's Motion for Accelerated Decision on Count III (Nov. 16, 2004) ("DuPont's Count III Reply"). Thereafter, OCE filed its reply brief as to Count III. *See* Complainant's Reply in Support of Complainant's Motion for Accelerated Decision on Count III (Dec. 13, 2004) ("OCE's Count III Reply").

On December 6, 2004, the EPA filed an additional Complaint against DuPont, under Docket Number TSCA-HQ-2005-5001, which brought a TSCA count titled "Results of PFOA Serum Testing." In the latter count, OCE alleges failure or refusal to submit to the EPA data concerning human serum sampling of twelve members of the general population living near the Washington Works Facility, which DuPont obtained on or after July 29, 2004 but no later than August 5, 2004. DuPont filed an answer to the latter count. OCE moved to consolidate the new Complaint with the pending action, and I granted consolidation.[2]

[2] Now that the two complaints have been consolidated, the TSCA count titled "Results of PFOA Serum Testing" shall be referred to as Count IV.

On December 16, 2004, I heard oral arguments on the parties' motions for accelerated decision on Counts II and III.[3] Thereafter, I issued an order directing post-argument briefs to be submitted no later than February 4, 2005, that post-argument briefs should focus on issues raised at the oral argument, and that reply briefs would not be accepted.[4] Order Setting Briefing Schedule (Dec. 28, 2004). The parties filed their post-oral argument briefs on February 4, 2005. *See* DuPont's Post-Argument Brief on Pending Motions for Accelerated Decision ("DuPont's Post-Argument Br."); Complainant's Post-Argument Briefs on Counts II and III ("OCE's Post-Argument Br.").

Standard for Adjudicating a Motion for Accelerated Decision

Section 22.20(a) of the Rules of Practice[5] authorizes the Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Technologies, Inc.*, RCRA (3008) Appeal No. 97-5, 9 E.A.D. 61, 74-75 (EAB 2000); *In the Matter of Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (ALJ, Sept. 11, 2002). Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, TSCA Appeal 93-1, 6 E.A.D. 1 (EAB 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the Tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59; *see also Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 528 (10th Cir. 1994). Summary judgment on a matter is inappropriate when

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[3] The oral arguments took place in Washington, D.C., in the EPA Administrative Courtroom.

[4] Accordingly, I need not consider reply briefs or similar filings, such as motions for clarification, filed after February 4, 2005, in response to the post-argument briefs.

[5] Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits.

contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In assessing materiality for summary judgment purposes, the Supreme Court has determined that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson*, 477 U.S. at 248; *Adickes*, 398 U.S. at 158-159. The substantive law involved in the proceeding identifies which facts are material. *Id.*

The Supreme Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the non-moving party. *Id.* In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the non-moving party under the evidentiary standards in a particular proceeding. *Anderson*, 477 U.S. at 252.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under Rule 56(e), "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." The Supreme Court has found that the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment, as Rule 56(e) requires the opposing party to go beyond the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, September 9, 2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; *see In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position. Of course, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the non-moving party under the "preponderance of the evidence" standard.

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

DISCUSSION

I. Count II

A. The Alleged Groundwater Notification Violation

DuPont admits that it has owned and operated a manufacturing facility, known as Washington Works in Washington, West Virginia at all times relevant to this matter. Amended Answer ¶ 1. DuPont further admits that it manufactured, processed, or distributed in commerce a chemical substance or mixture as those terms are defined in Section 3 of TSCA, 15 U.S.C. § 2602, and Section 8(f) of TSCA, 15 U.S.C. § 2607(f). Amended Answer ¶ 2. DuPont admits that it used ammonium perfluorooctanoate ("APFO") as a processing aid at its Washington Works Facility. *Id.* ¶ 13. It is undisputed that APFO is composed of an ammonium cation and a perfluorooctanoate acid ("PFOA") anion. *Id.* ¶ 5. Furthermore, when in contact with water, APFO disassociates to: (1) the PFOA anion; and (2) the ammonium cation. *Id.* ¶ 13. DuPont refers to APFO as "C-8." *Id.* ¶ 4.

DuPont admits that when analytical chemists test blood or environmental media for APFO, they generally estimate the level of APFO present by testing for the concentration of the anion, PFOA. *Id.* ¶ 6. Therefore, test results may purport to measure levels of APFO, C-8, or PFOA in blood or water, but actually measure only PFOA. *Id.* DuPont admits that the Washington Works facility has released PFOA into the air, treated water containing PFOA in anaerobic digestion ponds, disposed of water containing PFOA into landfills, and discharged PFOA into the Ohio River. *Id.* ¶ 14.

DuPont admits that at high enough doses and durations of exposure, PFOA has been shown to produce liver toxicity in some test animals, and that at lower doses can produce such toxicity through a process known as induction of peroxisome proliferation. *Id.* ¶ 15. However, DuPont states that humans are not susceptible to peroxisome proliferation. *Id.* DuPont admits that PFOA is "biopersistent" in animals and humans, as well as "bioaccumulative" in humans, based on DuPont's understanding of those terms. *Id.* ¶¶ 16-17. DuPont further admits that, based on current knowledge, PFOA is not naturally occurring, that all PFOA present in human blood is attributable in some sense to human activity, and that PFOA is produced synthetically.[6] *Id.* ¶ 20.

Under Count II, titled "Public Water Supply Contamination," OCE alleges that on or about June 6, 1991, DuPont set a Community Exposure Guideline for drinking water ("CEGw") at 1 microgram per liter ("1 µg/L" or "1 ppb")[7] for PFOA, and that in June of 1991, DuPont's Washington Works Facility was aware of the 1 ppb CEGw that had been established for PFOA. Amended Complaint ¶ 68. In contrast, DuPont contends that on or about June 6, 1991, DuPont's acceptable exposure level committee set a provisional CEGw for PFOA at 1 microgram per liter, and that DuPont did not adopt the provisional CEGw for PFOA in water until on or about February 7, 1992.[8] Amended Answer ¶ 68.

OCE alleges that at the time DuPont adopted a CEGw at 1 ppb, it had collected results from drinking water samples, documented in various memorandums, and had information regarding the level of PFOA detected in such samples. Amended Complaint ¶ 69. In response, DuPont states that the documents to which OCE refers are the best evidence of their contents, and to the extent that OCE's allegations do not accurately state the contents of that document, those allegations are denied. Amended Answer ¶ 69.

OCE alleges that the EPA was not informed at the time DuPont obtained monitoring data showing "contamination" of the public water supply prior to 1991, and subsequent to that time. Amended Complaint ¶ 80. OCE alleges that DuPont was required under Section 8(e) of TSCA to immediately report the information concerning DuPont's monitoring data of the "contamination" of the public water supply for the communities in the vicinity of its Washington Works Facility and this obligation continued as DuPont learned more about the contamination. *Id.* ¶ 81. Finally, OCE alleges that DuPont was required under Section 8(e) of TSCA to inform the EPA every day between July 24, 1991 and March 6, 2001 (when the EPA received

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[6] In response to my question at the oral argument, "[I]s the EPA alleging human health effects, or is it strictly an environmental media," OCE stated, "Count II is strictly the environmental contamination data that DuPont became aware of in mid to late 1991 . . . ." Oral Arg. Tr. at 62.

[7] The acronym "ppb" means "parts per billion," and "µg/L" means micrograms per liter.

[8] The dispute of fact about the CEGw is not determinative for purposes of this order on DuPont's motion for accelerated decision.

information about the alleged contamination) about the information that it had obtained on the "widespread contamination" of public drinking water at a level greater than its CEGw, and that DuPont was required to inform the EPA immediately about information concerning the PFOA "contamination" of public drinking water that DuPont obtained in 1984. *Id.* ¶¶ 82-83. DuPont denies that the information in question reasonably supports any conclusion of substantial risk, and moreover, denies that the *EPA* considers the information at issue to reasonably support the conclusion of a substantial risk of injury to health or the environment. Amended Answer ¶¶ 78, 80.

As alleged in Count II, on or about June 6, 1991, DuPont set its community exposure guideline for drinking water at 1 part per billion ("ppb"). Oral Arg. Tr. at 70. OCE further alleges that on June 23, 1991, DuPont detected PFOA in a new well in Lubeck, which was approximately 2.7 miles from DuPont's Washington Works Facility. *Id.* According to OCE, "on June 26, 1991, DuPont began analyzing its water contamination data collected, admittedly, from '84 until '91 to decide whether or not to report to the [EPA] under TSCA 8(e)." *Id.* at 70-71. DuPont allegedly found that there had been levels of PFOA in wells, with one of the samples reading 3.9 ppb. *Id.* at 71; *see* OCE's Count II Response, Ex. 23. However, according to OCE, DuPont decided that no Section 8(e) notification was warranted. Oral Arg. Tr. at 71. OCE submits that "Where EPA's Count II comes into play is in two more dates, September 11, 1991, and November [19], 1991."[9] *Id.*; *see also id.* at 62.[10] On September 11, 1991, DuPont allegedly had a meeting and discussed all prior water sampling events in the context with what was going in mid to late 1991 terms of DuPont's dealing with the Lubeck Water Authority. *Id.* at 71 (referring to OCE's Count II Response, Ex. 23); *see also* OCE's Count II Response at 11. In its pre-argument brief, OCE contends that DuPont took additional water samples on November 19, 1991, with levels above the alleged CEGw level of 1 ppb and that a November memorandum reports these results. OCE's Count II Response at 12 (citing OCE's Count II Response, Ex. 24).

DuPont moves for accelerated decision and for dismissal of Count II on the ground that OCE is barred from bringing such an enforcement action as a matter of law by the parties' prior consent agreement and a consent order entered into as part of the TSCA § 8(e) Compliance Audit Program. DuPont's Motion for Acc. Dec. at 2.

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[9] *See* OCE's Count II Response, Exs. 23 and 24.

[10] In response to my question, "[I]s the EPA alleging human health effects, or is it strictly an environmental media," OCE stated, "Count II is strictly the environmental contamination data that DuPont became aware of in mid to late 1991 and withheld from the [EPA], Your Honor. It does build on prior data, some data points that may have preceded 1991." Oral Arg. Tr. at 62.

B. Introduction to Section 8(e) of TSCA and the TSCA Section 8(e) Compliance Audit Program

Section 8(e) of TSCA became effective on January 1, 1977. DuPont points out that Congress did not grant the EPA any rulemaking authority with respect to Section 8(e), nor did it grant the EPA any general rulemaking authority under TSCA. *Id.* at 7; *see* TSCA § 8(e), 42 U.S.C. § 2607(e). Thus, in 1977 the EPA proposed guidance on its interpretation of and policy concerning the provisions of Section 8(e) and solicited and received comments. 43 Fed. Reg. 11,110 (Mar. 16, 1978). On March 16, 1978 the EPA published a Statement of Interpretation of Enforcement Policy for Notification of Substantial Risk Under Section 8(e) ("1978 Enforcement Policy"), which the EPA published in the Federal Register. *Id.*

The 1978 Enforcement Policy provides that "A 'substantial risk of injury to health or the environment' is a risk of considerable concern because of (a) the seriousness of the effect [see Subparts (a), (b), and (c) below for an illustrative list of effects of concern], and (b) the fact or probability of its occurrence." *Id.* at 11,111. 1978 Enforcement Policy, Part V (brackets in original). For purposes of determining what constitutes substantial risks, Part V of the 1978 Enforcement Policy categorizes effects for which substantial-risk information must be reported under three main categories: (a) "human health effects," (b) "environmental effects," and (c) "emergency incidents of environmental contamination." *Id.* at 11,112. The 1978 Enforcement Policy further subcategorizes those effects. *Id.* Subcategory (b)(1) is "widespread and previously unsuspected distribution in environmental media, as indicated in studies (excluding materials contained within appropriate disposal facilities)." *Id.* Subcategories (b)(2)-(5) include the following environmental effects: (b)(2) "Pronounced bioaccumulation. Measurements of indicators of pronounced bioaccumulation heretofore unknown to the [EPA] Administrator . . . should be reported when coupled with potential for widespread exposure and any non-trivial adverse effect"; (b)(3) "Any non-trivial adverse effect, heretofore unknown to the [EPA] Administrator, associated with a chemical known to have bioaccumulated to a pronounced degree or to be widespread in environmental media"; (b)(4) "Ecologically

significant changes in species' interrelationships . . . ," and; (b)(5) "Facile transformation or degradation to a chemical having an unacceptable risk . . . ." *Id.*

On February 1, 1991, the EPA announced the opportunity to register for the TSCA Section 8(e) Compliance Audit Program ("CAP"). 56 Fed. Reg. 4,127, 4,128. The CAP called for registrants to audit and report for Section 8(e) information, provided for stipulated penalties for each study or report submitted pursuant to the CAP, and set an overall limit on penalties to be assessed pursuant to the CAP.

On June 20, 1991, the EPA announced suspension of Part V(b)(1) ("widespread and previously unsuspected distribution in environmental media, as indicated in studies (excluding materials contained within appropriate disposal facilities)") and Part V(c) ("emergency incidents of environmental contamination") of the 1978 Enforcement Policy. 56 Fed. Reg. 28,458, 28,459. The EPA stated that, despite the suspension of V(b)(1) and V(c) of the 1978 Enforcement Policy, "regulatees auditing their files for reportable environmental risk information under the TSCA Section 8(e) Compliance Audit Program should be guided by the statutory language of section 8(e) and Part V(b)(2) through (b)(5) of the [1978 Enforcement Policy]." *Id.* Moreover, "In assessing whether information or studies involving widespread and previous unsuspected environmental distribution, emergency incidents of environmental contamination, or other previously unknown situations involving significant environmental contamination should be submitted under the TSCA Section 8(e) Compliance Audit Program, or under section 8(e) in general, regulatees should make a reasonable judgement whether such information meets the statutory standards of TSCA section 8(e) instead of relying on Parts V(b)(1) or V(c) of the [1978 Enforcement Policy]." *Id.* EPA's June 1991 Federal Register notice concluded, "Even though EPA is suspending the applicability of Parts V(b)(1) and V(c) of the [1978 Enforcement Policy], persons are still responsible under TSCA section 8(e) to report information that reasonably supports a conclusion of substantial risk of injury to the environment. This is a continuing statutory obligation." *Id.*

On or about July 5, 1991. DuPont registered for the TSCA Section 8(e) CAP by signing the Registration and Agreement for TSCA Section 8(e) Compliance Audit Program ("CAP Agreement") *See* DuPont's Motion for Acc. Dec., Ex. 12, Attach. A.

On September 30, 1991, the EPA split the CAP into two phases. 56 Fed. Reg. 49,478, 49,479. It announced, "Because refinement of guidance on reportability of information on chemical release/detection in environmental media is underway, EPA is extending the reporting deadline for reporting such information under the TSCA Section 8(e) CAP to 6 months after publication of final reporting guidance." *Id.* According to the parties' Consent Agreement, on or about January 31, 1992, the EPA mailed an "Addendum" to DuPont to modify the CAP Agreement "only regarding the reporting of information on the release of chemical substances to and detection of chemical substances in all environmental media." DuPont's Motion for Acc. Dec., Ex. 12 (Consent Agreement, Docket No. TSCA-96-H-47 (Oct. 1, 1996) ("Consent Agreement"), Part I.C.

DuPont and the EPA subsequently agreed to a Revised Addendum to the TSCA Section 8(e) CAP Agreement ("Revised Addendum"), dated June 27, 1996, which sets forth the waiver of enforcement action at issue in this matter.[11] *See* Consent Agreement, Attach. B. Part IV.A of the Revised Addendum reads:

> Information on the release of chemical substances to and detection of chemical substances in environmental media, or environmental toxicity data for plant effluents, that predates the effective date of the final revised guidance will not be the subject of an EPA TSCA section 8(e) penalty enforcement action.

On October 1, 1996, the parties signed a Consent Agreement, which incorporates the terms of the CAP Agreement and the Revised Addendum. The EPA Environmental Appeals Board ("EAB") then executed a Consent Order, approving the Consent Agreement. *Id.*, Ex. 13 ("Consent Order," Docket Number TSCA-96-H-47 (Oct. 3, 1996)).

C. Introduction to the Parties' Arguments

In summary, DuPont argues that the charges in Count II are barred by the CAP Agreement entered into by DuPont and the EPA, as amended by the Revised Addendum, which were incorporated into the Consent Agreement signed by the parties and approved by the EAB in the Consent Order. Specifically, DuPont argues that under the Revised Addendum, dated June 27, 1996, the EPA clearly and unambiguously promised not to bring a Section 8(e) enforcement action based on information that existed prior to the effective date of the final revised guidance on the reportability of Section 8(e) information, which was published in the Federal Register on June 3, 2003.[12] DuPont asserts that the information on which Count II is based existed prior to the final revised guidance. Therefore, DuPont argues, the EPA is barred from enforcing the alleged violations under Count II.

OCE counters that DuPont oversimplifies the matter by highlighting only limited language of the Revised Addendum that supports its argument, and that when the language of the Revised Addendum and the CAP is viewed in whole it is apparent that DuPont's assertions are false. OCE contends that the CAP instituted a backwards-looking audit of limited duration to resolve past compliance. Specifically, OCE variously contends that the EPA waived its ability to

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[11] The Revised Addendum states that the Revised Addendum supersedes the original Addendum to the CAP Agreement ("Addendum"). According to the parties' Consent Agreement, on or about January 31, 1992, the EPA mailed the Addendum to DuPont to modify the CAP Agreement "only regarding the reporting of information on the release of chemical substances to and detection of chemical substances in all environmental media." Consent Agreement, Part I.C.

[12] TSCA Section 8(e); Notification of Substantial Risk; Policy Clarification and Reporting Guidance, 68 Fed. Reg. 33,129 (June 3, 2003).

press enforcement actions as to information on the release of chemical substances to and detection and chemical substances in environmental media "generated" prior to the announcement of the CAP on February 1, 1991 (or alternatively, prior to the CAP commencement date of July 1, 1991, or; prior to DuPont's registration for the CAP, on or about July 5, 1991), and prospectively, from June 27, 1996 forward.

OCE contends that, under Section 8(e) of TSCA, DuPont was subject to an ongoing statutory obligation from 1991 through 1996 to report information on the release of chemical substances to and detection and chemical substances in environmental media, and that this obligation was not affected or eliminated by the CAP or the CAP Agreement. OCE argues that Paragraph IV.A of the Revised Addendum does not bar Count II, as advanced by DuPont. Admitting that the Revised Addendum waived enforcement, OCE asserts that such waiver of enforcement does not apply to the period from the beginning of the CAP in 1991 to 1996, when the EPA eliminated "Phase 2" of the CAP, via the Revised Addendum.

In the alternative, DuPont submits that even if the CAP were a "lookback" audit, then it was a lookback from February 28, *1992* backwards, which was the original deadline for reporting data under the CAP. As noted, OCE contends that Count II "comes into play" on September 1991 and November 1991. Accordingly, DuPont argues that even under OCE's "lookback" theory, the EPA waived enforcement of the matters alleged in Count II.

As another basis for accelerated decision, DuPont argues that Count II is barred by the EAB's Consent Order, by virtue of res judicata. DuPont contends, *inter alia*, that the instant matter arises out of the same nucleus of facts as the 1996 complaint the EPA filed against DuPont pursuant to the CAP Agreement and by the EAB's Consent Order on that matter, which incorporated the Revised Addendum. DuPont further contends that the EPA could have asserted the current Count II in the 1996 complaint but did not. OCE counters that the Revised Addendum did not waive enforcement over the September and November 1991 dates that allegedly form the basis for Count II, and that the Consent Order, incorporating the parties' Consent Agreement, specifically permits matters of non-compliance to be litigated.

D. Contract Law and Parol Evidence (Extrinsic Evidence)

Consent agreements have many of the attributes of ordinary contracts and as such they should be construed, basically, as contracts. *United States v. ITT Cont'l Banking Co.*, 420 U.S. 233, 237-38 (1975); *accord Village of Kaktovic v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982); *United States v. N. Colo. Water Conservancy District*, 608 F.2d 422, 430 (10th Cir. 1979). This type of settlement contract may not be unilaterally rescinded. *Village of Kaktovic*, 689 F.2d at 230. Consent agreements in settlement of EPA administrative enforcement actions are "enforceable like any other agreement; the fact that the subject matter of the agreement does not limit itself to the assessment of a civil penalty is irrelevant to its enforceability." *In re Chem. Waste Management, Inc.*, 1 E.A.D. 851, 857 n.11 (JO 1984) (citing *Village of Kaktovic*, 689 F.2d at 230). Therefore, I turn to contract law in examining the enforcement waiver contained in the Revised Addendum, which was incorporated into the parties' Consent Agreement.

Language within a contract must be read "in the context of the entire agreement" and must be construed "so as not to render portions of it meaningless." *Dalton v. Cessna Aircraft*, 98 F.3d 1298, 1305 (Fed. Cir. 1996); *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 565 (7th Cir. 1995); *accord In re Julie's Limousine & Coachworks, Inc.*, CAA Appeal No. 03-06, 2004 EPA App. LEXIS 23, slip op. at 21-22 & n.31 (EAB, July 23, 2004), 11 E.A.D. ___ (fundamental principles of textual interpretation dictate that the adjudicator must interpret the text so as to give each word meaning and to avoid creating surplusage). When a contract term is unambiguous, the courts determine its meaning as a matter of law at the summary judgment stage. *LeJune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1073 (3rd Cir. 1996) (applying federal common law); *accord Murphy*, 61 F.3d at 564-65; *NRM Corp. v. Hercules, Inc*, 758 F.2d 676, 681-82 (D.C. Cir. 1985). "Determining whether contract language is ambiguous is also a question of law, and contract language is ambiguous if the terms are inconsistent on their face, or if the terms allow reasonable but differing interpretations of their meaning." *Rodrigues-Abreu v. Chase Manhattan Bank*, 986 F.2d 580, 586 (1st Cir. 1993) (citing cases).

"If the language of the contract is ambiguous, we turn to surrounding circumstances, undisputed extrinsic evidence, to divine the parties' intent." *Id.* (citing, *inter alia, Lumpkin v. Envirodyne Industries*, 933 F.2d 449, 456 (7th Cir. 1991)); *accord NRM*, 758 F.2d at 682 ("Only if the court determines as a matter of law that the agreement is ambiguous will it look to extrinsic evidence of intent to guide the interpretive process."). "Summary judgment based upon the construction of contract language is appropriate only if the meaning of the language is clear, considering all the surrounding circumstances and undisputed evidence of intent, and there is no genuine issue as to the inferences which might reasonably be drawn from the language." *Rodrigues-Abreu*, 986 F.2d at 586 (citing cases); *accord NRM*, 758 F.2d at 682 ("When, however, the language is unclear and the search for intent extends beyond the four corners of the agreement, the intended meaning of the contract is a disputed and, necessarily, material question of fact and summary judgment is improper.").

As discussed previously, the burden for summary judgment is on the movant. For Count II, DuPont is the only party moving for summary judgment. Therefore, the narrow issue before me is whether the contractual provision at issue – the waiver of enforcement – is unambiguous in favor of the movant, DuPont, when taking into account that the movant has the burden on this count and that all reasonable inferences of material fact are drawn in favor of the non-moving party, OCE.

E. Description of the Consent Agreement, Including the CAP Agreement and the Revised Addendum

As discussed, the starting point for contractual interpretation is to look within the four corners of the contract, to determine whether the contract is unambiguous. The settlement agreement (i.e., contract) in this matter consists of the "Consent Agreement," Docket No. TSCA-96-H-47, executed by the "Regulatee" (DuPont) and the EPA, and filed on October 1, 1996 with

the following attachments: Attachment A – the CAP Agreement,[13] and; Attachment B – the Revised Addendum to the CAP Agreement. DuPont's Motion for Acc. Dec., Ex. 12. On October 3, 1996, the EAB executed a "Consent Order," under Docket Number TSCA 96-H-47, which approved the Consent Agreement. *Id.*, Ex. 13. The Consent Order consists of a brief recitation of the penalty amount and payment procedures, and expressly incorporates the Consent Agreement by reference. *Id.* The Consent Agreement is attached to the Consent Order. *See id.*

The Consent Agreement provides, "All of the terms and conditions of this Consent Agreement together comprise one agreement, and each of the terms and conditions is in consideration of all of the other terms and conditions."[14] Consent Agreement, Part VI.H. Accordingly, the Consent Agreement and its attachments are an integrated contract and the parol evidence rule applies.

DuPont contends that the plain language of the Revised Addendum waived enforcement over all the allegedly reportable information OCE cited as the basis for Count II. In particular, DuPont focuses on the language in Part IV.A of the Revised Addendum, which reads:

> *Information* on the release of chemical substances to and detection of chemical substances in environmental media, or environmental toxicity data for plant effluents, *that predates the effective date of the final revised guidance* will not be the subject of an EPA TSCA section 8(e) penalty enforcement action.

Revised Addendum, Part IV.A (emphasis added). DuPont emphasizes that Part IV.A states plainly that the EPA waived all Section 8(e) claims based on "environmental data" that existed before the revised guidance, published in 2003. DuPont's Count II Reply at 3. Further, DuPont argues that if the EPA had intended to qualify "predates" it could have easily done so. *Id.*

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[13] The CAP Agreement is undated, as are the date(s) of the signatures to the CAP Agreement. However, Unit (i.e., Part or Section) I.D. of the CAP Agreement provides, "the TSCA Section 8(e) Compliance Audit Program shall commence no later than July 1, 1991." The Consent Agreement states that on or about July 5, 1991, DuPont registered for the TSCA section 8(e) CAP by signing the CAP Agreement. Consent Agreement at 1. However, OCE asserts that DuPont signed the CAP Agreement on June 28, 1991. OCE's Count II Response at 8 (citing OCE's Count II Response, Ex. 26)); Oral Arg. Tr. at 77 (citing to DuPont's Motion for Acc. Dec., Ex. 8); OCE's Post-Argument Br. on Count II at 5. A review of the cited exhibits as well as the rest of the record currently before this Tribunal does not indicate the purported June 28, 1991 registration date.

[14] *See also* CAP Agreement, Unit II.D.5: "All of the terms and conditions of this CAP Agreement together comprise one agreement, and each of the terms and conditions is in consideration for all of the other terms and conditions."

The Consent Agreement recounts that on February 1, 1991, the EPA published a Federal Register notice (56 Fed. Reg. 4,128) that set forth the TSCA Section 8(e) CAP and announced the opportunity for all regulated parties to register for and participate in the CAP. Consent Agreement, Part I.A. Reportedly, 122 companies registered for the CAP. On April 26, 1991 and June 20, 1991, the EPA published Federal Register notices (56 Fed. Reg. 19,514 and 56 Fed. Reg. 28,458) that modified certain terms of the TSCA Section 8(e) CAP. Consent Agreement, Part I.A. The Consent Agreement states that "on or about July 5, 1991," DuPont registered for the TSCA Section 8(e) CAP by signing the CAP Agreement. Consent Agreement, Parts I.B and II.B.

The CAP Agreement provides, "The Regulatee [DuPont] agrees to conduct a TSCA Section 8(e) Compliance Audit Program to determine its compliance status with TSCA section 8(e)." CAP Agreement, "Unit" (i.e., Part or Section) I.A. Thus, the CAP Agreement provides for DuPont to audit its records to find Section 8(e) violations and to report such to the EPA. As originally written, the CAP was to commence no later than July 1, 1991 and terminate on February 28, 1992,[15] and all submissions under the CAP would have to be delivered to the EPA no later than February 28, 1992. CAP Agreement, Unit I.D-E. The parties agreed, "This CAP Agreement and the Consent Agreement and Consent Order in this matter shall be a complete settlement of all civil and administrative claims and causes of action which arose or could have arisen under TSCA section 8(e) in connection with any study or report listed or submitted pursuant to the terms of this CAP Agreement." CAP Agreement, Unit II.A.1.

The CAP Agreement provides, "In conducting the TSCA Section 8(e) Compliance Audit Program, the Regulatee [DuPont] shall follow the statutory language of TSCA section 8(e) and [the 1978 Enforcement Policy], with the exception of Parts V(b)(1) and V(c) of the [1978 Enforcement Policy] to determine whether the reviewed study or report is:" (a) not reportable, (b) reportable, or (c) data that would have been reportable under Section 8(e) when initially obtained by the Regulatee, and that subsequent to the Section 8(e) reporting deadline (and before June 18, 1991), were previously submitted. CAP Agreement, Unit II.B.1. However, Footnote 1 of the CAP Agreement qualifies, "In determining whether the kind of information or studies referenced in Parts V(b)(1) and V(c) (i.e., widespread and previously unsuspected distribution in environmental media and emergency incidents of environmental contamination) should be submitted under the TSCA Section 8(e) Compliance Audit Program, the Regulatee [DuPont] should make a reasonable judgement whether such information meets the statutory standards of TSCA section 8(e) instead of relying on the guidance in Parts V(b)(1) and V(c) of the [1978 Enforcement Policy]." CAP Agreement at 3 n.1.

Pursuant to the CAP Agreement, DuPont agreed to pay stipulated civil penalties for all studies or reports submitted under the CAP as Section 8(e) data. CAP Agreement, Unit II.B.2. The stipulated penalty amounts were "$15,000 per study for any submitted study or report involving effects in humans" and "$6,000 per study for any other submitted study or report

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[15] However, the CAP Agreement provided that the EPA could grant extensions to the termination date. CAP Agreement, Unit I.E.

submitted as TSCA section 8(e) data," and $5,000 for each late-submitted study or report that was received by the EPA prior to June 18, 1991. CAP Agreement, Unit II.B.2-3. The parties agreed to a $1,000,000 cap on the total civil penalty for each Regulatee.[16] CAP Agreement, Unit II.B.3.

Upon termination of the CAP, the Regulatee was to provide the EPA with a Final Report certifying that the CAP has been completed. CAP Agreement, Unit II.B.5. As provided in the CAP Agreement, following termination of the audit, the EPA agreed to present the Regulatee with a Consent Agreement and Consent Order summarizing the results of the CAP and specifying the terms of payment of stipulated civil penalties. CAP Agreement, Unit II.B.6.

Under "Other Matters," the CAP Agreement provides that "Nothing in this CAP Agreement shall relieve the Regulatee from complying with all applicable TSCA regulations or other applicable environmental statutes." CAP Agreement, Unit II.D.

On or about January 31, 1992, the EPA mailed the "Addendum to the CAP Agreement" ("Addendum") to DuPont to modify (as stated in the Consent Agreement) the CAP Agreement "only regarding the reporting of information on the release of chemical substances to and detection of chemical substances in all environmental media." Consent Agreement, Part I.C. "The deadline for reporting all other information under the CAP remained unchanged at February 28, 1992 unless otherwise extended."[17] Consent Agreement, I.C.

On or about June 27, 1996, DuPont entered into an agreement, referred to as the Revised Addendum, to supersede the Addendum and to modify the CAP Agreement to specify that DuPont (referred to as the Regulatee in the Revised Addendum) "[i]s no longer required to conduct a file search for information on the release of chemical substances to and detection of chemical substances in environmental media, or for environmental toxicity on plant effluents; and that a second Final Report is no longer necessary." Consent Agreement, Part I.D. According to the Consent Agreement, DuPont timely submitted the Final Report on or about October 26, 1992. Consent Agreement, Part II.D.

Therefore, the first Final Report, which DuPont submitted on or about October 26, 1992, became the only Final Report. The Final Report indicated that a total of 1,380 studies were listed or submitted as Section 8(e) data pursuant to the CAP Agreement, with: 24 human health effects studies, at $15,000 per study; 1,287 studies listed under the category for "any other study

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[16] For instance, DuPont's overall penalty under the Section 8(e) CAP was $1,000,000. Consent Agreement, Part V.E. However, DuPont's penalty would have been $8,427,000 without the $1,000,000 limit. DuPont's Motion for Acc. Dec., Ex. 11 (Docket No. TSCA-96-H-47, Complaint, Sept. 30, 1996) at 6.

[17] According to the Consent Agreement, "[DuPont] submitted the Addendum to EPA on September 26, 1992; however, EPA presently has no record of an Addendum for [DuPont]." Consent Agreement, I.C.

or report submitted as TSCA Section 8(e) data" (i.e., for studies that were not human health effects studies), at $6,000 per study, and; 69 late-submitted studies given to the EPA prior to June 18, 1991, at $5,000 per study. Consent Agreement, Parts II.D and IV. Pursuant to the limitation on overall penalties under the CAP Agreement, DuPont's total civil penalty was $1,000,000. Consent Agreement, Part IV. The Consent Agreement provided, under "Other Matters," that "Nothing in this Consent Agreement and Consent Order shall relieve [DuPont] of the duty to comply with all applicable provisions of TSCA and other environmental statutes." Consent Agreement, Part VI.

Turning to the Revised Addendum to the CAP Agreement, Paragraph I of the Revised Addendum provides:

> The TSCA Section 8(e) Compliance Audit Program, which the Regulatee agreed to conduct in the Registration requirement I.A. does not include: information on the release of chemical substances to and detection of chemical substances in environmental media; or environmental toxicity data on plant effluents. The Regulatee, therefore, is no longer required to conduct a file search for this information. Further, footnote 1 of the [CAP] Agreement pertains solely to chemical release and detection information and therefore, is no longer applicable to the administration of the TSCA Section 8(e) Compliance Audit Program.

Paragraph II of the Revised Addendum provides that the first Final Report shall be considered the Final Report and controlling document for purposes of determining the information listed or submitted under the CAP. The Revised Addendum, at Paragraph III, states that "EPA intends to publish final revised guidance in the Federal Register on reporting information on the release of chemical substances to and detection of chemical substances in environmental media." Furthermore, "EPA also intends to publish a question and answer document to illustrate application of the guidance. The final revised guidance will not be effective prior to EPA's publication of the question and answer document." Revised Addendum, Paragraph III.

Paragraph IV of the Revised Addendum reads as follows:

> IV. Impact of the final revised guidance on:
>
> A. Information on the release of chemical substances to and detection of chemical substances in environmental media, or environmental toxicity data for plant effluents, that predates the effective date of the final revised guidance will not be the subject of an EPA TSCA section 8(e) penalty enforcement action.

> B. Information on the release of chemical substances to and detection of chemical substances in environmental media, or environmental toxicity data for plant effluents, that may have been submitted under Phase 1 of the CAP Program will not result in the assessment of penalties for such studies or reports submitted under this TSCA Section 8(e) Compliance Audit Program.

The Revised Addendum, at Paragraph V, provides that "Information generated after the effective date of the new final revised guidance on the release of chemical substances to and detection of chemical substances in environmental media, or environmental toxicity data for plant effluents, will be submitted prospectively pursuant to TSCA Section 8(e) and the new final revised guidance, not the CAP Agreement. Therefore, no penalty will accrue under the CAP Agreement for the submission of such information."

F. The Parties' Arguments Regarding the Duration of the Waiver of Enforcement

1. DuPont's Arguments As to the Waiver of Enforcement

DuPont contends that in the Revised Addendum (in Part I), the EPA stated explicitly that DuPont need not search its files for data regarding detection of chemicals in environmental media, and that the EPA then promised (in Part IV.A) that the EPA would not bring a Section 8(e) enforcement action based on information in DuPont's files prior to the effective date of the final reporting guidance, which was published in 2003. DuPont's Motion for Acc. Dec. at 24-25. Under DuPont's view, the contract language that is embodied in the Revised Addendum clearly and unambiguously states that DuPont need not search its files for preexisting data regarding detection of chemicals in water samples, and that the EPA would not bring a Section 8(e) enforcement action for any failure to report information prior to EPA's final guidance for that reporting. *Id.* at 25. DuPont points out that the water samples at issue in Count II are data that existed before the 2003 guidance. *Id.* According to DuPont's argument, due to the "plain language" of the Revised Addendum, the EPA promised not to assert, and waived any right to pursue, the enforcement action that the EPA now pursues in Count II. *Id.*

DuPont emphasizes that the word "predates" in Paragraph IV.A of the Revised Addendum "means what it says." DuPont's Count II Reply at 3. DuPont contends that the term predates "is not qualified by anything suggesting that it really means . . . 'predates, but only if it is after June 27, 1996.'" *Id.* DuPont argues that if the EPA intended to qualify 'predates,' it could have easily done so. *Id.* Furthermore, DuPont submits, "There is a strong presumption against reading into contracts provisions that easily could have been included but were not." *Id.* (quoting *Fix v. Quantum Indus. Partners LDC,* 374 F.3d 549, 553 (7th Cir. 2004)).

Regarding Paragraph IV.B of the Revised Addendum, DuPont argues that IV.A and IV.B actually address two different topics. *Id.* at 4. DuPont argues that IV.A tells DuPont and the other CAP registrants that were each asked to sign the Revised Agreement that they need not

submit "environmental data" that existed before the EPA issues its final revised guidance, and that the EPA would not bring any Section 8(e) enforcement action based on "environmental data" that existed before the EPA issues its final guidance. *Id.* Paragraph IV.B on the other hand, assures DuPont and the other CAP registrants that, if they already had submitted "environmental data" to the EPA under the CAP, they would not be fined under the original CAP for such submissions. *Id.* Paragraph IV.B was an effort to level the playing field between such submitters and those who had not made such a submission. *Id.* at 5; Oral Arg. Tr. at 18-20.

Furthermore, DuPont interprets Paragraph IV.A as stating that those persons who had not submitted environmental data would not be subject to Section 8(e) enforcement actions, but that IV.A does not address the fine status of those companies who had already submitted environmental data under the CAP and were facing automatic stipulated fines of $6,000 per study submitted. DuPont's Count II Reply at 5*;* Oral Arg. Tr. at 18-20. According to DuPont, the EPA added Paragraph IV.B to clarify that those who had already submitted "environmental data" would be placed on the same footing as those who had not submitted the data, by adding that those who had submitted such data would not be penalized for having reported the data. DuPont's Count II Reply at 5; Oral Arg. Tr. at 18-20. DuPont contends that Paragraph I of the Revised Addendum, only eliminates the requirement to *audit* for "environmental data", and that it does not address penalties or enforcement actions. Oral Arg. Tr. at 20. Therefore, according to DuPont's argument, Paragraph IV.B would be necessary to remove the threat of stipulated automatic penalties for "Phase 2" information submitted during "Phase 1." *Id.* at 20-21.

Finally, DuPont raises an argument as to the cutoff date for the CAP. DuPont submits, *in arguendo,* that even if the CAP were a "lookback" audit, then it was a lookback from February 28, *1992* backwards, which was the original deadline for reporting data under the CAP.[18] *Id.* at 108-09; DuPont's Post-Argument Br. at 8-9. February 28, 1992 comes after the September 1991 and November 1991 dates on which Count II allegedly "comes into play." Oral Arg. Tr. at 71; *see also id.* at 62. DuPont's argument is, "Thus, even if we assume, *arguendo,* that [OCE] is correct when it asserts that EPA only waived enforcement for data that existed prior to the original cut-off date for including data in the CAP, EPA still waived enforcement of Count II because all of the data in question in Count II existed prior to February 28, 1992. Thus even under [OCE's] 'look back' theory, EPA waived enforcement of the matters alleged in Count II." DuPont's Post-Argument Br. at 9.

[18] DuPont's deadline for submitting Phase 1-type information appears to have been extended beyond February 28, 1992, as the Consent Agreement states that DuPont timely submitted the its Final Report for audited information on or about October 26, 1992. *See* Consent Agreement, Part II.D.

2. OCE's Arguments As to the Waiver of Enforcement

In contrast to DuPont's position, OCE argues that DuPont was subject to an ongoing statutory obligation under Section 8(e) of TSCA to report information on the release of chemical substances to and detection of chemical substances in environmental media that ran from 1991 through 1996, and that the EPA never eliminated this obligation through the CAP or the Revised Addendum.

First, OCE indicated that the language "Phase 2" of the CAP refers to "information on the release of chemical substances to and detection and chemical substances in environmental media." OCE's Count II Response at 15. Later, OCE clarified its position to mean that "Phase 2" of the CAP requires the submission of environmental contamination data not just under Part V(b)(1) of the 1978 Enforcement Policy, but also under Parts V(b)(2)-(5), even though the guidance for V(b)(2)-(5) had never been called into question. OCE's Post-Argument Br. on Count II at 3; *see also* Oral Arg. Tr. at 69-70.[19] Count II, which mentions bioaccumulation and biopersistence, among other effects, (Amended Complaint ¶¶ 15-20), may be interpreted as alleging not just V(b)(1)-type violations, but also other environmental effects-type violations that would fall under V(b)(2)-(5).

Initially, OCE posited that the plain language of Paragraph I of the Revised Addendum removed the CAP's applicability to Phase 2 data generated after June 27, 1996 (the date of the Revised Addendum), in effect voiding the Phase 2 portion of the CAP program. OCE's Count II Response at 18. Furthermore, OCE stated that Paragraph IV.A of the Revised Addendum is consistent with EPA's interpretation of Paragraph I of the Revised Addendum. *Id.* According to OCE, Paragraph IV.A of the Revised Addendum operates as a prospective waiver of OCE's right to enforce Section 8(e) claims from June 27, 1996 until the issuance of a final "Phase 2" reporting deadline, thereby temporarily relieving regulatees of their obligations until promulgation of final reporting guidelines.[20] *Id.* OCE stated that it is for the latter reason that OCE is not seeking additional penalties from DuPont at this time for the period from 1996 until today. *Id.* at 18 n.15.

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[19] At oral argument, I asked OCE whether Paragraph IV.A of the Revised Addendum, using the language "release of chemical substances to and detection of chemical substances in environmental media," is the same as Part V(b)(1) of the 1978 Enforcement Policy, which uses the language "widespread and previously unsuspected distribution in environmental media." Oral Arg. Tr. at 68-69. OCE responded, "I believe that the terminology used by EPA in the 1996 Addendum is subsumed within the broader category of V(b) environmental contamination." *Id.* at 69. Then, in response to my question: "So, it's not limited to V(b)(1), the charges that you're alleging in Count II," OCE responded, "In Count II, it is environmental contamination, so it is V(b)." *Id.* at 69-70.

[20] However, at oral argument, OCE submitted that the EPA may have actually granted a prospective waiver as early as May 15, 1996, which is the date of the Cover Letter to the Revised Addendum. Oral Arg. Tr. at 79.

Regarding Paragraph IV.B, OCE contends that the EPA reached back to waive its right to enforce penalty actions against regulatees who may have submitted "Phase 2" data at any time prior to the issuance of the Revised Addendum on June 27, 1996. OCE's Count II Response at 19. As argued by OCE, to give Paragraph IV.A of the Revised Addendum the reading advocated by DuPont – that the EPA waived the right to enforce Section 8(e) for Phase 2 data generated at *any* time prior to finalization of the guidance – is incorrect, because that reading would render Part IV.B. meaningless. *Id.*

OCE further argues, "If Respondent's reading of IV.A were correct, there would be *no need* for an explicit waiver for Phase 2 data that had been submitted during the Phase 1 reporting period, because under Respondent's interpretation of the Addendum, regulatees would be off the hook for *all* Phase 2 data generated at any time before issuance of the final guidance in 2003, including that submitted under Phase 1." *Id.* (footnote omitted). Therefore, "Respondent's reading would render IV.B of the Revised Addendum meaningless, violating well-established principles of contract interpretation." *Id.*

In its post-argument brief, OCE argues that Paragraph I of the Revised Addendum eliminated the Phase 2 reporting requirement, which OCE interprets as meaning "[t]here could be no *CAP* penalties for Phase 2 information." OCE's Post-Argument Br. on Count II at 10-11 (emphasis added). In doing so, OCE points out the language of Paragraph I stating that the "TSCA Section 8(e) Compliance Audit Program . . . does not include: information on the release of chemical substances to and detection of chemical substances in environmental media; or environmental toxicity data on plant effluents." *Id.* at 10 & n.4. OCE states that Paragraph I of the Revised Addendum "eliminated the Phase 2 reporting requirement, meaning that by definition, there could be no CAP penalties for Phase 2 information."[21] *Id.* at 11. "However, industry was then subject to potential penalties for pre-1991 information that was no longer covered by the CAP." *Id.* "(In essence, elimination of the Phase 2 CAP removed the protection industry would have received for pre-1991 violations.)" *Id.* "[Paragraph] IV(B) was therefore added to address this unintended exposure for Phase 2 information submitted pursuant to the CAP, and ensure that all parties were treated the same regarding their historic violations of TSCA § 8(e)." *Id.* As noted, OCE contends that reading Paragraph IV.A as a retroactive waiver would render Paragraph IV.B superfluous. *See id.* at 10.

Regarding the cutoff date for information falling under the CAP, OCE indicates a cutoff date as early as February 1, 1991, when the EPA first announced the CAP in the Federal Register, and as late as July of 1991.[22] OCE asserts that, "It was made extremely clear, like

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[21] *See also* OCE's Count II Response at 19 n.16.

[22] In its pre-oral argument brief, OCE stated that "the purpose of the CAP in 1991 was to allow companies that signed up to conduct an audit of their compliance status under TSCA § 8(e) *as of that point in time*." OCE's Count II Response at 14. The latter statement would indicate that the CAP covered information generated prior to the date when DuPont signed the (continued...)

many EPA enforcement initiatives, that the purpose was to address past noncompliance, to allow defendants to pay stipulated penalties and then move on." Oral Arg. Tr. at 77. Furthermore, OCE argues that the CAP refers only to violations committed prior to February (or July) 1991 backward, by pointing to the CAP Agreement's "Other Matters" provision, which states: "Nothing in this CAP Agreement shall relieve the Regulatee from complying with all applicable TSCA regulations or other applicable environmental statutes."[23] Oral Arg. Tr. at 78 (quoting CAP Agreement, Unit II.D). In sum, according to OCE, the EPA would have a window of opportunity to enforce Section 8(e) violations for information generated after February (or July) 1991 up to the June 27, 1996 Revised Addendum.

3. Arguments Regarding the Extrinsic Documents

In support of their positions concerning the duration of the enforcement waiver in Part IV.A of the Revised Addendum, the parties have submitted various documents outside the four corners of the Consent Agreement. Principally, these documents include the cover letter to the Revised Addendum and various Federal Register notices concerning the CAP, and a comment and response document.

The parties refer to the following Federal Register notices: (1) Registration and Agreement for TSCA section 8(e) Compliance Audit Program; Notice, 56 Fed. Reg. 4,127 (Feb. 1, 1991) ("February 1991 notice"); (2) Registration and Agreement for TSCA section 8(e) Compliance Audit Program Modification, 56 Fed. Reg. 19,514 (Apr. 26, 1991) ("April 1991 notice"); (3) Registration and Agreement for TSCA section 8(e) Compliance Audit Program Modification; Notice, 56 Fed. Reg. 28,458 (June 20, 1991) ("June 1991 notice"), and; (4) Registration and Agreement for TSCA Section 8(e) Compliance Audit Program Modification, 56 Fed. Reg. 49,478 (Sept. 30, 1991) ("September 1991 notice"). The cover letter to the Revised

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[22](...continued)
CAP Agreement. Furthermore, in its post-argument brief, OCE contends that the CAP audit period was designed to review information generated up to the date DuPont signed to participate in the CAP. OCE's Post-Argument Br. on Count II at 5. OCE asserts that DuPont signed the CAP Agreement on June 28, 1991. (However, the Consent Agreement, at 1, states that DuPont signed the CAP Agreement "on or about July 5, 1991," and there is not yet support in the record before me for a specific date of June 28, 1991.) OCE also indicates a cutoff date of July 1, 1991 in its pre-argument briefs, where OCE states that DuPont had an ongoing obligation to report between July 1, 1991 and June 27, 1996. OCE's Count II Response at 17, 20. Finally, at the oral argument, OCE put forth a cutoff date of February 1, 1991: "During what I'm calling the entire CAP development period, which was from announcement of the CAP in February of 1991 through the closing of the CAP in July of 1996, DuPont was obligated to stay in ongoing compliance with TSCA Section 8(e)." Oral Arg. Tr. at 59. Nevertheless, all three dates are prior to the September and November 1991 dates that OCE put forth to support Count II.

[23] DuPont signed the CAP Agreement "on or about July 5, 1991." Consent Agreement at 1.

Addendum, which is dated May 15, 1996, was sent from Jesse Baskerville, Director of the Toxics and Pesticides Enforcement Division, EPA, and addressed to DuPont. DuPont's Motion for Acc. Dec., Ex. 9 ("Cover Letter to Revised Addendum"). Finally, there is the February 20, 2003 Comment and Response Document for Revised Policy Statement of Section 8(e) of TSCA. DuPont's Motion for Acc. Dec., Ex. 14 ("2003 Comment and Response Document").

DuPont argues that Count II is barred not only by the "plain meaning" of the Revised Addendum, but also when taking into account the context in which the contract was executed and common sense. Oral Arg. Tr. at 10, 15, and 21.

DuPont contends that the 1978 Enforcement Policy speaks in general terms and does not set clearly defined standards. DuPont's Motion for Acc. Dec. at 7. As a result, states DuPont, each company subject to Section 8(e) was required to exercise individual subjective judgment to determine what information must be reported, and that the lack of guidance led to a number of disagreements between the EPA and regulated entities. *Id.* at 7-8. For example, in 1984, 1989, and 1990, respectively, the EPA filed enforcement actions against Union Carbide Corporation, Monsanto Company, and Halocarbon Products Corporation, in each case for allegedly failing to submit a single study or piece of information. *Id.* at 8. In settling these matters, the EPA and the respondent took what DuPont describes as the "unusual step" of setting forth in the respective consent agreements a detailed discussion of their continuing substantial differences of opinion regarding the clarity of the reporting standards, the scope of reporting obligations under Section 8(e), and whether the information in question actually triggers Section 8(e)'s mandatory reporting obligations. *Id.* (citing DuPont's Motion for Acc. Dec., Exs. 5, 6, and 7).

DuPont notes that on February 1, 1991, the EPA announced a one-time voluntary Section 8(e) CAP, February 1991 notice, 56 Fed. Reg. 4,127, "to avoid similar disputes." DuPont's Motion for Acc. Dec. at 8. Under the CAP Agreement that the EPA had developed, any company that registered for the CAP pledged to audit its files for reportable information not previously submitted to the EPA, report any information that the EPA might consider reportable, and pay a stipulated penalty of $6,000 to $15,000 for each previously unreported study or report. *Id.* In return, the EPA agreed, among other things, that each company's total liability would be limited to $1,000,000, regardless of how many previously unreported studies the company submitted. *Id.* (citing February 1991 notice, 56 Fed. Reg. at 4,130).

Shortly after announcing the CAP, the EPA announced modifications to the CAP program. *Id.* at 9 (citing April 1991 notice, 56 Fed. Reg. at 19,514). The EPA was concerned about a so-called "data dump"; that without further guidance on what information must be submitted under TSCA Section 8(e), companies would give the EPA too much information. *Id.* (citing 56 Fed. Reg. at 19,514)). Therefore, states DuPont, the EPA pledged to issue, prior to the July 1, 1991 deadline for the CAP registration, an 8(e) Reporting Guide that would include a record of all previous initial submissions made under 8(e), a compilation of Question and Answer ("Q&A") documents EPA had recently prepared, and a written review of several hypothetical "case histories" prepared by the Chemical Manufacturers Association, each of

which illustrated various issues for which guidance was lacking. *Id.* (citing 56 Fed. Reg. at 19,515)).

On June 20, 1991, the EPA issued the "TSCA Section 8(e) Reporting Guide" ("1991 Reporting Guide") and announced its availability.[24] *Id.* (citing June 1991 notice, 56 Fed. Reg. at 28,458). In the June 1991 notice, the EPA acknowledged that the 1978 Enforcement Policy needed "additional clarification" and that "possible misinterpretation" likely would lead to "over-reporting." *Id.* (quoting 56 Fed. Reg. at 28,458). Accordingly, the EPA formally "suspended" Parts V(b)(1) and V(c) of the 1978 Enforcement Policy and declared that it would prepare new guidance on reporting standards. *Id.* (citing 56 Fed. Reg. at 28,459). DuPont points out that, according to the June 1991 notice, CAP participants were to be guided solely by the statutory language when auditing company records of "detection of chemicals in environmental media." *Id.* at 9. Shortly after this announcement, DuPont registered for the CAP by signing the standard form CAP Agreement. *Id.* at 10. Under the (original) terms of the CAP Agreement, each participant was to complete its audit and submit a final report to the EPA no later than February 28, 1992. *Id.*

DuPont notes, "On September 30, 1991, however, EPA extended indefinitely the CAP reporting deadline for information on the detection of chemicals in environmental media, instructing companies that such information need not be audited and reported until six months after EPA published its final revised guidance on reporting for such information." *Id.* (citing September 1991 notice, 56 Fed. Reg. at 49,478). The September 1991 notice predicted that the EPA would issue the final revised guidance in Spring 1992. *Id.* (citing 56 Fed. Reg. at 49,479). In issuing the September 1991 notice, the EPA split the CAP into two phases, which DuPont interprets as follows: "'[P]hase I' of the CAP would be limited to auditing for reportable toxicology studies, with final reports still due to EPA by February 28, 1992, while 'Phase II' (regarding information on detection of chemicals in environmental media) would involve a six-month auditing period triggered by publication of EPA's revised guidance." *Id.* (citing 56 Fed. Reg. at 49,479).

DuPont emphasizes the importance of the September 1991 notice. DuPont's Count II Reply at 8. DuPont points out that the September 1991 notice was EPA's final Federal Register statement on the reporting deadline for "environmental data" until the EPA circulated its Revised Addendum five years later. *Id.* DuPont points out that the September 1991 notice "states clearly" that the deadline for all CAP participants, which includes DuPont, to report environmental data was extended until six months after publication of final reporting guidance. *Id.* DuPont argues that the September 1991 notice is a "clear statement" of EPA's intent to waive enforcement during that period, which "strongly corroborates" DuPont's interpretation of

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[24] DuPont asserts that the 1991 Reporting Guide did not include any EPA standards for "reporting detection of chemicals in environmental media." DuPont's Motion for Acc. Dec. at 9. Neither DuPont nor OCE, to date, have provided this Tribunal with a copy of the 1991 Reporting Guide. (Although its availability was announced in the Federal Register, it does not appear to have been published in the Federal Register.)

the Revised Addendum. *Id.* As for the Addendum to the CAP Agreement, DuPont asserts that the Addendum it signed gave the same assurance that the EPA had given in the September 1991 notice.[25] *Id.* at 9.

DuPont contends that EPA's 1993 notice confirms that EPA's September 1991 notice waived any Section 8(e) penalty enforcement action. Oral Arg. Tr. at 14 (referring to 1993 notice, 58 Fed. Reg. at 37,736). DuPont goes on to argue, "then comes the Revised Addendum . . . and at no time did EPA ever say to any of the CAP participants well, now, you have to hurry up and report." *Id.* Instead, argues DuPont, in 1991 the EPA extended the time for reporting and in 1993 the EPA confirmed that, and in the Revised Addendum the EPA states that it is waiving any Section 8(e) penalty enforcement action. *Id.*

DuPont argues that the Cover Letter to the Revised Addendum assured CAP participants that the EPA would not bring an enforcement action based on *any* environmental data that existed before the effective date of the final guidance. DuPont's Count II Reply at 9 (citing Cover Letter to the Revised Addendum at 2). In particular, DuPont quotes two sentences from the Cover Letter to the Revised Addendum, which read as follows:

> [E]PA has decided that it is reasonable and equitable to enforce the final revised reporting guidance on a prospective basis only. *Therefore,* information on the release of chemical substances to and detection of chemical substances in environmental media; . . . that predate the effective date of the guidance will not be the subject of an EPA TSCA Section 8(e) enforcement action.

Id. (quoting Cover Letter to Revised Addendum at 2) (emphasis added). DuPont quotes the dictionary definition of "therefore," meaning "for that reason, consequently." *Id.* at 9 (quoting *Webster's New Collegiate Dictionary,* G.&C. Merriam Co. 1201 (1979)). Accordingly, DuPont argues that "the only reasonable reading of these two sentences is that EPA had concluded that 'it is reasonable and equitable to enforce the final guidance on a prospective basis only' and, *for that reason,* environmental data that 'predate the effective date of the guidance will not be the subject of an EPA TSCA Section 8(e) enforcement action.'" *Id.* at 9-10.

DuPont further argues that in the 2003 Comment and Response Document, regarding the proposed final revised guidance, the EPA again expressed that any data that existed before the final guidance would not form the basis of any EPA enforcement action. *Id.* at 10. In particular, DuPont points to the follow exchange:

> COMMENT: Once EPA finalizes its new section 8(e) guidance, it should only be applied prospectively. The Agency [EPA] itself has admitted that the nature and scope of section 8(e) reporting

[25] The parties have not provided this Tribunal with a copy of the Addendum that DuPont signed.

> requirements for environmental information have not been clear, and it took the unusual step of suspending its prior guidance. Moreover, many additional Federal and state reporting requirements have been enacted since TSCA became effective in 1976,[26] further muddying the regulatory waters.
>
> The confusion associated with the scope of environmental reporting under section 8(e), and the absence of Agency attention to the issue, contrasts sharply with the long history of health-related section 8(e) guidance and reporting. Given this history, and the continuing questions raised about the Agency's proposal [sic] new guidance, it would be inappropriate to apply the guidance retroactively.
>
> RESPONSE: Given the circumstances noted by the commenter, the suspension of the previous guidance, the emphasis on health and environmental effects reporting, the length of time required to propose revised guidance, and the greater specificity of the revised guidance, EPA has concluded that the revised guidance will be enforced prospectively. This means that companies will not have to review preexisting files for information that may be subject to section 8(e) reporting. *These preexisting files would only come into "play" if data obtained by a company after the effective date of the guidance triggered a review* of such data and in doing so the combination of data met the section 8(e) reporting criteria.

Id. (emphasis added). DuPont interprets EPA's response to the comment as expressly stating that the preexisting files would trigger potentially enforceable reporting obligations *only* if new data caused the company to go back and review its old data, and the combination of the new and old data met the Section 8(e) reporting criteria. *Id.* at 10.

OCE, on the other hand, sees two separate tracks: one track for information generated prior to February 1, 1991 (or prior to July 1991) and a separate track for information generated after those dates up to 1996. Oral Arg. Tr. at 59, 65. To support this argument, OCE points to the Federal Register notices. Regarding the period from early to mid 1991 through 1996, OCE contends there was an ongoing statutory obligation to report information on the release of chemical substances to and detection of chemical substances in environmental media. *Id.* at 65; OCE's Count II Response at 14-15. Furthermore, OCE contends that the September 1991 notice suspended "Phase 2" under the *CAP* program's lookback audit, but that it did *not* suspend the reporting obligation for ongoing compliance with the statute. Oral Arg. Tr. at 64-66.

Regarding the Cover Letter to the Revised Addendum, OCE argues that instead of promising to not bring any Section 8(e) claims for information generated at any time prior to the

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[26] TSCA became effective on January 1, 1977.

2003 guidance, OCE promised to not bring such claims for information generated *prospectively* – from June 27, 1996, forward – until the final guidance.[27] EPA's Count II Response at 20 (citing Cover Letter at 2: "EPA has decided that it is reasonable and equitable to enforce the final revised reporting guidance *on a prospective basis only*" (emphasis added)). OCE asserts, "There is a very big difference between the CAP audit program, which was an enforcement initiative undertaken in 1991, and then the [1996 Revised Addendum and its Cover Letter],[28] which arguably affected more than just the CAP program." Oral Arg. Tr. at 65; *see also* OCE's Count II Response at 14-15. As for the 2003 Comment and Response Document, OCE submits that DuPont ignores the requirement that still existed between February 1, 1991, and June 27, 1996, to comply with the statutory provisions of Section 8(e) of TSCA, irrespective of the guidance. Oral Arg. Tr. at 86.

G. Discussion of the Waiver of Enforcement and the Cutoff Period for the CAP

1. Analysis Within the Four Corners of the Consent Agreement

As discussed, when a party moves for accelerated decision on the ground that a consent agreement bars enforcement, summary judgment is inappropriate unless the consent agreement unambiguously bars enforcement in favor of the movant. Furthermore, only if the language of the consent agreement is ambiguous, does the adjudicator turn to surrounding circumstances, undisputed extrinsic evidence, to divine the parties' intent. The Consent Agreement expressly incorporates, and therefore includes within its four corners, the CAP Agreement and the Revised Addendum.

Quite frankly, I am having great difficulty making sense of the Revised Addendum within the four corners of the Consent Agreement, the CAP Agreement, and the Revised Addendum. Not helping matters, as discussed *supra*, OCE has adjusted its interpretation throughout these proceedings as to many key aspects of the Revised Addendum, which may suggest that the EPA – who drafted the Revised Addendum – does not have a clear vision of the meaning of the Revised Addendum. Nevertheless, the burden at this juncture is on DuPont to prove that the language of the Consent Agreement is unambiguous.

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[27] In response to my question, "What happened in 1996 that caused EPA to change its position?," EPA counsel made the bald assertion that "EPA was facing potential statute of limitations problems with the closeout of Phase 1." Oral Arg. Tr. at 73; *see also* Complainant's Post-Argument Br. on Count II at 3 (no citation of support provided). I place no reliance on factual assertions unsupported by the record presently before me.

[28] By "the letter that came out in 1996," OCE appears to be referring to the Cover Letter to the Revised Addendum, which included the Revised Addendum as an attachment.

I note that some of the key terms, or potentially key terms, used in the Revised Addendum are not defined or not clearly defined within the four corners of the Consent Agreement, the CAP Agreement, and the Revised Addendum, or within the Consent Order. Looking solely within the four corners, the undefined or not clearly defined terms include: "Phase I," "environmental toxicity data for plant effluents," "information on the release of chemical substances to and detection of chemical substances in environmental media," and "final revised guidance."[29] As these terms are not defined within the four corners of the Consent Agreement, CAP Agreement, and Revised Addendum, I cannot discern a clear meaning of the enforcement waiver at issue, and therefore cannot interpret such waiver unambiguously in favor of the movant.[30] For this reason alone, a denial of DuPont's motion for accelerated decision is warranted.

Additionally, DuPont has not sustained its burden under the accelerated decision standard because OCE's arguments concerning the language of the Consent Agreement, CAP Agreement, and Revised Addendum are adequate to defeat DuPont's motion. Within their four corners, the Consent Agreement, CAP Agreement, and Revised Addendum, may be read as creating a lookback audit, for information existing prior to early to mid-1991, separate from ongoing statutory obligations to comply with TSCA. For instance, these three documents may be read as indicating that the EPA announced the CAP on February 1, 1991,[31] that the CAP was to commence no later than July 1, 1991,[32] that DuPont registered on or about July 5, 1991,[33] and

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[29] The absence of definitions for "information on the release of chemical substances to and detection of chemical substances in environmental media, or environmental toxicity data for plant effluents" is particularly troublesome. The parties agree that Paragraph IV.A of the Revised Addendum waives enforcement over such information, but disagree as to whether the waiver is retroactive or prospective. However, without a definition of these terms, within the confines of the Consent Agreement, it is not clear whether such waiver affects all of the types of information alleged in Count II. For instance, in Count II OCE suggests a very wide range of effects, by entitling Count II as "Public Water Supply Contamination," and alleging that PFOA has been shown to produce liver toxicity in test animals, that PFOA is biopersistent in animals and humans, as well as bioaccumulative in humans.

[30] Although the Consent Agreement, at Part I.A., references the February, April, and June 1991 Federal Register notices, it does not expressly incorporate such notices as part of the Consent Agreement, and therefore such notices do not become part of the Consent Agreement. Morever, such notices do not readily clarify the meanings of these terms introduced by the Revised Addendum.

[31] Consent Agreement, Part I.A.

[32] CAP Agreement, Part I.B and I.D.

[33] Consent Agreement, Part I.B.

that the CAP did not relieve DuPont of the duty to comply with TSCA,[34] which suggests a lookback audit separate from statutory compliance. Moreover, all three documents make reference to the Compliance Audit Program. Within the context of the CAP being a lookback audit, Paragraph I of the Revised Addendum may be read as terminating the audit as to the so-called "Phase 2" information dated prior to 1991, but then exposing CAP registrants to penalties and/or enforcement actions as to such information already reported pursuant to the CAP under the so-called "Phase 1." Paragraph IV.B of the Revised Addendum may be read as eliminating the assessment of penalties for Phase 2 reports and studies submitted under Phase 1. Accordingly, one may read Paragraph IV.B as providing some protection against the assessment of penalties for information submitted prior to the termination of the CAP in Paragraph I. DuPont argues that Paragraph IV.A creates a retroactive waiver of enforcement, but the protection against the assessment of penalties in Paragraph IV.B would arguably render such a retroactive waiver superfluous, in violation of contract law principles.[35] Moreover, the CAP Agreement itself provides: "All of the terms and conditions of this CAP Agreement together comprise one agreement, and each of the terms and conditions is in consideration for all of the other terms and conditions."[36] Finally, Paragraph IV.A may be read as a prospective waiver of enforcement action, commencing in 1996, when reading it within the context of there being a lookback audit and that ongoing statutory compliance was required from early to mid-1991 through 1996.

With regards to the language in Paragraph IV.A, DuPont quotes *Fix v. Quantum Industrial Partners, LDC*, 374 F.3d 549, 553 (7th Cir. 2004), for the following principle: "There is a strong presumption against reading into contracts provisions that easily could have been included but were not."[37] OCE's Count II Reply at 3. In the latter case, however, the court held that the contract's terms were unambiguous on the face of the contract, rendering summary judgment appropriate, and thus the court excluded extrinsic evidence that contradicted the language of the contract; in particular, the parties had expressly adopted a term from a separate document, but chose *not* to adopt language from that very same document that was at odds with the terms of the contract. *Id.* Clearly, based on the facts that are presently before me, the factual situation in the *Fix* case is distinguishable from the instant matter.

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[34] Consent Agreement, Part VI.A ("Other Matters"); *see also* CAP Agreement, Part II.D.1 ("Other Matters"). *But see infra* note 38.

[35] It is an axiom in contract law that language within a contract must be read "in the context of the entire agreement" and must be construed "so as not to render portions of it meaningless." *Dalton v. Cessna Aircraft*, 98 F.3d 1298, 1305 (Fed. Cir. 1996); *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 565 (7th Cir. 1995).

[36] CAP Agreement, Unit II.D.5.

[37] I would point out that *Fix* is a diversity case in which *state* law was the controlling law rather than federal law.

In conclusion, DuPont has not sustained its burden on summary judgment. I emphasize to the parties that my determination that an evidentiary hearing is warranted and that summary judgment is inappropriate does not suggest that I have developed or adopted a particular interpretation of the Consent Agreement and Consent Order, the CAP Agreement, or the Revised Addendum to the CAP Agreement. It simply means that the language is susceptible to interpretation contrary to the interpretation put forth by the movant. Furthermore, I note that I may deny a motion for accelerated decision (i.e., summary judgment) as a matter of discretion in order to fully develop the evidence concerning the disputed language, particularly in light of the potential ramifications such a determination may have on the other CAP registrants. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

2. Analysis Taking Into Account Extrinsic Documents

As discussed *supra*, summary judgment on Count II is not appropriate. Nevertheless, I examine the extrinsic evidence proferred by the parties, which primarily consists of several Federal Register notices, the Cover Letter to the Revised Addendum, and the 2003 Comment and Response Document. Both parties argue that the proferred extrinsic evidence supports their respective interpretations of the language of the Consent Agreement, the CAP Agreement, and the Revised Addendum.

With the February 1991 Federal Register notice, the EPA announced the opportunity to register for EPA's TSCA Section 8(e) Compliance Audit Program ("CAP"). 56 Fed. Reg. at 4,128. The CAP was originally set to commence February 1, 1991, and close on May 2, 1991, *id.*, but the commencement and closing dates were later amended. The CAP was a "*one-time* voluntary" program, designed to strongly encourage companies to voluntarily audit their files for studies reportable under Section 8(e). *Id.* at 4,129 (emphasis added). Persons interested in registering for the CAP were required to request a CAP Agreement and submit a signed CAP Agreement to the EPA no later than May 2, 1991. *Id.* at 4,128.

The February 1991 notice stated that "Up-to-date information on hazard and exposure is vital in supporting EPA efforts to protect human health and the environment from risks from toxic chemicals," and that the "EPA has the responsibility under TSCA to perform needed risk assessments on chemicals." *Id.* "Companies that do not report vital information are undermining the effectiveness of the early warning system intended under section 8(e)." *Id.* EPA recognized that there was, at the very least, a perception of significant disincentives to dissuade companies from auditing "*past* studies" and reporting them to EPA, due to high monetary penalties. *Id.* at 4128 (emphasis added). Furthermore, in evaluating some enforcement cases, the EPA found that some companies may have been misinterpreting Section 8(e) of TSCA and the 1978 Enforcement Policy. *Id.* The EPA emphasized that it had not changed its interpretation. *Id.* at 4,128-29. However, the EPA clarified that if serious health effects are discovered, then companies must submit the information without further evaluation (i.e., without using a weight-of-the-evidence method of discounting the significance of the information). *Id.* at 4,128; *see also* Oral Arg. Tr. at 72. The February 1991 notice stated that the CAP "has been developed" to encourage industry reporting by setting forth guidelines that identify in advance

EPA's enforcement response and allow companies to assess liability prior to electing to participate. 56 Fed. Reg. at 4,129.

Following that announcement were the initially proposed terms of the CAP Agreement. *Id.* at 4,129-31. Under "Other Matters" under the proposed terms for the CAP Agreement was the following provision: "Nothing in this CAP Agreement shall relieve the Regulatee from complying with all applicable TSCA regulations or other applicable environmental statutes." *Id.* at 4,130. The latter provision also exists in the CAP Agreement DuPont signed. CAP Agreement, Unit II.D; *see also* Oral Arg. Tr. at 78.

The February 1991 notice can be reasonably read as providing some support for OCE's position that the CAP was designed as a "lookback" auditing program. The February 1991 notice first announced OCE's disagreement with companies' use of the weight-of-the-evidence method for health effects and then the notice set forth limitations for that method. Once that clarification had been made, EPA announced a "one-time" auditing program for "past studies." Moreover, the requirement under the "Other Matters" provision that CAP registrants continue to follow the law is written in the present tense.[38] *See* Oral Arg. Tr. at 74, 78.

The April 1991 Federal Register notice announced modifications to the CAP and the CAP Agreement. 56 Fed. Reg. at 19,514. The April 1991 notice states that the CAP is a "one-time voluntary audit program developed in order to achieve EPA's goal of obtaining any *outstanding* TSCA section 8(e) data." *Id.* (emphasis added).

Principally, the April 1991 notice expressed concern about an overflow, or "data dump," of information resulting from the audits.[39] *Id.* The EPA recognized that proper application of

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[38] On the other hand, the precise wording of the "Other Matters" provision at issue states that "Nothing in this CAP Agreement shall relieve the Regulatee from complying with all applicable TSCA *regulations* or *other* applicable environmental *statutes*." There is no *regulation* that implements Section 8(e) of TSCA, and as correctly observed by DuPont, Congress did not confer any rulemaking authority on the EPA as to Section 8(e). *See* DuPont's Motion for Acc. Dec. at 7. Rather, the EPA implements TSCA by way of policies, such as the 1978 Enforcement Policy and the 2003 guidance. In contrast, the Consent Agreement, which was executed in 1996, has its own "Other Matters" provision, which reads: "Nothing in this Consent Agreement and Consent Order shall relieve Respondent of the duty to comply with all applicable *provisions* of TSCA and other environmental statutes." Consent Agreement, Part VI.A (emphasis added).

[39] Indeed, the CAP program's $1,000,000 limitation on overall penalties may have acted as an incentive for companies to overreport. A person regulated by Section 8(e) might submit as many studies as possible in order to shield the company from enforcement actions involving those studies. If such a person had already reached the $1,000,000 limit, there would no longer be the threat of stipulated penalties for the extra studies submitted under the CAP program. For (continued...)

Section 8(e) requires the exercise of scientific judgment. *Id.* The April 1991 notice announced EPA's plans to disseminate a Section 8(e) reporting guide, comprised of status reports, a compilation of question and answer ("Q&A") documents, and a written review of several hypothetical 'case histories' prepared by the Chemical Manufacturers Association. *Id.* at 19,515. The latter review of case histories was in response to a written request from the Chemical Manufacturers Association for additional guidance in the areas of neurotoxic effects and environmental effects/releases. *Id.* The April 1991 notice stated that EPA would make every effort to complete the reporting guide in early June 1991 and release it prior to the revised registration deadline/audit commencement date of June 18, 1991. *Id.* "However, if necessary because of a delay in completion of the guidance on the environmental effects/release information, reporting of this information under the TSCA Section 8(e) Compliance Audit Program will be put on a specific schedule . . . " *Id.* at 19,514.

The April 1991 notice extended the CAP registration deadline/audit commencement date for 45 days, to June 18, 1991. *Id.* Furthermore, it extended the CAP audit termination date/deadline date for approximately 90 days, to February 28, 1992 (which is the same termination date used in DuPont's CAP Agreement). *Id.*

The April 1991 notice can be reasonably read as indicating that there was a lookback audit under the CAP for prior studies, consistent with OCE's argument. In particular, the April 1991 notice reiterated that this "one-time" audit program was developed in order to obtain "any *outstanding"* TSCA Section 8(e) data. *Id.* (emphasis added).

The June 20, 1991 notice announced the availability of a Section 8(e) reporting guide and announced modifications to the CAP program and to the CAP Agreement. June 1991 notice, 56 Fed. Reg. at 28,458. The June 1991 notice stated that the "TSCA Section 8(e) Compliance Audit Program is a one-time voluntary compliance audit program developed to obtain outstanding TSCA section 8(e) data *and* foster compliance with the statutory obligations of TSCA section 8(e)." *Id.* (emphasis added). The CAP modifications again extended the registration deadline, this time to July 1, 1991 (which became the final registration deadline),[40] and modified EPA's guidance for reporting information concerning "widespread and previously unsuspected

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[39](...continued)
instance, in absence of the $1,000,000 limit on stipulated penalties under the CAP, DuPont would have owed $8,427,000 for the over 1,380 studies it submitted to the EPA. DuPont's Motion for Acc. Dec., Ex. 11 (Docket No. TSCA-96-H-47, Complaint, Sept. 30, 1996 ("1996 Complaint")) at 6.

[40] As noted previously within this decision, the Consent Order states that DuPont registered for the CAP on or about July 5, 1991. However, the latter date would make the registration untimely due to the deadline of July 1, 1991, unless the EPA granted a registration extension to DuPont. Nevertheless, OCE does not raise an argument as to the timeliness of DuPont's registration. Moreover, OCE makes the (unsupported) assertion in its briefs that DuPont registered on or about June 28, 1991, which would render DuPont's registration timely.

distribution in environmental media" and "emergency incidents of environmental contamination" under Section 8(e). *Id.* Moreover, the June 1991 notice added a stipulated penalties provision, at $5,000 each, regarding studies or reports that were received by the EPA prior to June 18, 1991, but were late in meeting the 15-day reporting deadline under the 1978 Enforcement Policy. *See id.* at 28,458-59. The CAP Agreement DuPont signed reflects the modifications from the April 1991 and June 1991 Federal Register notices. Furthermore, the CAP Agreement DuPont signed on or about July 5, 1991 provides that the CAP "shall commence no later than July 1, 1991." CAP Agreement, I.D.

With the June 1991 notice, the EPA suspended Parts V(b)(1) and V(c) of the 1978 Enforcement Policy, which concern "widespread and previously unsuspected distribution in environmental media, as indicated in studies (excluding materials contained within appropriate disposal facilities)" and "emergency incidents of environmental contamination," respectively. 56 Fed. Reg. at 28,459. The June 1991 notice states that in reviewing the 1978 Enforcement Policy "in connection with the TSCA Section 8(e) Compliance Audit Program," the EPA has determined that Part V(b)(1) and Part V(c) of the 1978 Enforcement Policy need additional clarification and that possible misinterpretation with regard to the guidance in these sections could lead to overreporting *under the TSCA Section 8(e) Compliance Audit Program*." *Id.* (emphasis added). Therefore, the EPA announced plans to review the reporting of information in order to determine what information of these types should "continue to be considered for submittal" under Section 8(e), and that interested persons would be allowed the opportunity to comment on proposed revisions to Parts V(b)(1) and V(c). *Id.*

The June 1991 notice stated that, despite the suspension of V(b)(1) and V(c) of the 1978 Enforcement Policy, "regulatees auditing their files for reportable environmental risk information under the TSCA Section 8(e) Compliance Audit Program should be guided by the statutory language of section 8(e) and Part V(b)(2) through (b)(5) of the [1978 Enforcement Policy]." *Id.* Moreover, "In assessing whether information or studies involving widespread and previous unsuspected environmental distribution, emergency incidents of environmental contamination, or other previously unknown situations involving significant environmental contamination should be submitted under the TSCA Section 8(e) Compliance Audit Program, *or under section 8(e) in general*, regulatees should make a reasonable judgement whether such information meets the statutory standards of TSCA section 8(e) instead of relying on Parts V(b)(1) or V(c) of the [1978 Enforcement Policy]." *Id.* (emphasis added). The June 1991 notice concluded with the admonition that, "Even though EPA is suspending the applicability of Parts V(b)(1) and V(c) of the [1978 Enforcement Policy], persons are still responsible under TSCA section 8(e) to report information that reasonably supports a conclusion of substantial risk of injury to the environment. This is a continuing statutory obligation." *Id.*

Thus, the June 1991 notice can reasonably be read as having been addressed towards two groups: (1) regulatees auditing for information pursuant to the CAP ("under the Compliance

Through a 1995 Federal Register notice, the EPA solicited additional public comment on revisions to Part V(b)(1) of the 1978 Enforcement Policy. TSCA Section 8(e); Notice of Availability of Draft Policy and Reopening of Comment Period, 60 Fed. Reg. 14,756 (Mar. 20, 1995) ("1995 notice"). The 1995 notice stated that the EPA had used the comments received in response to the 1993 proposed revisions to draft revised policy text that the EPA believed responded to the main comments. *Id.* Further, the 1995 notice announced that the EPA was making available for public comment the draft guidance text in the public docket.[44] *Id.* Comments were to be submitted and received by the EPA no later than May 4, 1995. *Id.*

The Cover Letter to the Revised Addendum, dated May 15, 1996, as well as the Revised Addendum, was signed by the EPA's Mr. Jesse Baskerville, who was Director of the Toxics and Pesticides Enforcement Division. The Cover Letter was addressed to DuPont, and below DuPont's address the salutation reads "Dear CAP Participant:" and then states that the September 1991 notice "[a]nnounced . . . an extension of the TSCA Section 8(e) *CAP* reporting deadline for submission of information regarding release of chemical substances to and detection of chemical substances in environmental media." Cover Letter at 1 (emphasis added). The Cover Letter states that the September 1991 "[a]nnouncement established a Phase Two of the *CAP* for section 8(e) information on the release of chemical substances to and the detection of chemical substances in environmental media and environmental toxicity data for plant effluents." *Id.* (emphasis added). The Cover Letter provides, "All TSCA Section 8(e) *CAP* submissions under Phase 2 were to be delivered to EPA no later than six months after EPA publishes final revised environmental guidance ('guidance')," and "The exact date would appear in the Federal Register notice announcing the revised guidance." *Id.* (emphasis added). The Cover Letter further states:

> On January 30, 1992, EPA provided CAP participants with an "Addendum to CAP Agreement" and policy statements that formally established the Two Phases to the CAP, and permitted the submission of the following information during Phase Two:
>
> > information on the release of chemical substances to and detection of chemical substances in environmental media, and
> >
> > environmental toxicity testing performed on plant effluents.

Id. The Cover Letter advised CAP participants: "The deadline for reporting all other information under the TSCA section 8(e) Compliance Audit Program remained unchanged at February 28, 1992 unless otherwise extended," and "The Addendum was to be executed by the Regulatee and returned to EPA for ratification and entry." *Id.*

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[44] Neither party has submitted to this Tribunal the 1995 draft revisions.